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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 528

MARION J. BERGUIDO, Individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3rd, by Their Guardian, MARION J. BERGUIDO,

Petitioners,

—v.—

EASTERN AIRLINES, INCORPORATED,

Respondent.

BRIEF OF RESPONDENTS IN *ALITALIA* v. *LISI*, NO. 1169 (1966) IN OPPOSITION TO MOTION FOR CONSOLIDATION

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Tel.: MU 2-1424

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THE ISSUES OF FACT AND LAW ARE ENTIRELY DIFFERENT IN THESE CASES, AND THERE IS NO CONFLICT BETWEEN THE APPELLATE COURTS

It should be preliminarily noted that the moving *Berguido* Petitioners failed to serve copies of their petition, briefs and record upon the undersigned.

1. Upon information and belief, there is no passenger ticket (which normally contains the contract or conditions of carriage) in the record in the *Berguido* case and no such passenger ticket was ever submitted to the court below. Flight segment coupons are only a part of the ticket.

2. In *Lisi,* the legibility and sufficiency of the actual ticket was submitted to the court by both sides as a matter of law. Both the district court and the Court of Appeals examined the *Alitalia* ticket and held that the ticket as such did not comply with the notice requirements of the Warsaw Convention. The question was originally presented to the district court in a motion by plaintiff for partial summary judgment, and came before the Court of Appeals, Second Circuit, after leave to appeal was duly granted following certification by the district court.

On the other hand, in *Berguido,* there was no ticket, nor ticket legibility issue, nor could there be any finding of fact or law by either the trial court or by the Court of Appeals, Third Circuit, that the ticket and its printed matter, if any, was legible or illegible. It is respectfully submitted that the Court of Appeals in *Berguido* did not rule upon this point, and there is no conflict of decision with *Lisi,* nor identity of facts or issues.

3. In an effort to identify with *Lisi,* the Petitioners, in effect, are now asking that the United States Supreme Court adjudicate in the first instance an issue of fact of legibility of a ticket not in evidence and which has not even been passed upon by (nor submitted to) the lower courts, and to employ a procedure which is normally the province of the lower court.

4. Consolidation of these actions would be harmful to and confuse the position of the *Lisi* Plaintiff-Respondents who are strenuously opposing granting of Certiorari in the *Lisi* case. In fact, the Government of the United States has already filed a brief in *Lisi,* supporting plaintiff-respondent's position and recommending that Certiorari be there denied.

5. Upon information and belief, there are a multiplicity of issues of fact, law, and procedure in the complex record after trial in the *Berguido* case, whereas in *Lisi,* there was a single simple issue of law involved, arising in a motion directed solely to that point and submitted to the court by both sides. Consolidation would seriously prejudice the *Lisi* respondents.

WHEREFORE it is respectfully submitted that the motion for consolidation be denied, and that the petition for a Writ of Certiorari in *Alitalia* v. *Lisi,* No. 1169, (1966) be denied.

Respectfully submitted,

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